

BEFORE THE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Petition for Redetermination
Under the Sales and Use Tax Law of:

Bergen Brunswick Drug Company
Account: SY EA 11-629749
Case ID: 89000012890

Appearances:

For Petitioner:	Rick Richman, Representative Kirk Merriman, Manager
For Sales and Use Tax Department:	Sharon Jarvis, Senior Tax Counsel
For Appeals Section:	John Abbott, Tax Counsel IV

MEMORANDUM OPINION

This opinion considers the merits of a petition for redetermination for the period April 1, 1994, through March 31, 1997. At the Board hearing, petitioner protested a portion (\$838,430.55) of a determination representing disallowed claimed exempt sales of prescription medicines to surgery centers, established by block sample.

Petitioner sold prescription medicines to surgery centers, hospitals, clinics, and drug stores. The surgery centers did not qualify as health facilities (e.g., hospitals) as defined under Health and Safety Code section 1250 since patients were not admitted for a period of 24 hours or longer. At the surgery centers, physicians performed medical procedures and had the medicines administered to their patients. The surgery centers did not sell the medicines to the physicians, and the surgery centers generally did not have pharmacies or bill the medicines to the patients separately from medical services.

The Sales and Use Tax Department contended that tax applied to petitioner's sales of prescription medicines to surgery centers since none of the exemptions from tax applied under Title 18, California Code of Regulations, section 1591, paragraph (d) (hereafter "section 1591"). Since the surgery centers did not sell the medicines to their physicians, the physicians could not have furnished the medicines for the treatment of their patients. Instead, the surgery centers, as the purchasers of the medicines from petitioner, furnished the medicines. There is no exemption currently available for sales of prescription medicines to surgery centers, rather than qualified health facilities, that furnish medicines for treatment of persons.

OPINION

As relevant to this opinion, section 1591 provides in part:

“(a) [¶].... [¶] (3) FURNISH. ‘Furnish’ means to supply by any means, by sale or otherwise. [¶]... [¶]

“(d) APPLICATION OF TAX—IN GENERAL. Tax applies to retail sales, including over-the-counter sales of drugs and medicines, and other tangible personal property by pharmacists and others. However, tax does not apply to the sale or use of medicines when sold or furnished under one of the following conditions:

(1) prescribed for the treatment of a human being by a person authorized to prescribe the medicines, and dispensed on prescription filled by a pharmacist in accordance with law, or

(2) furnished by a licensed physician, dentist or podiatrist to his or her own patient for treatment of the patient, or

(3) furnished by a health facility for treatment of any person pursuant to the order of a licensed physician, dentist or podiatrist, or

(4) sold to a licensed physician, dentist, podiatrist or health facility for the treatment of a human being....”

We conclude that petitioner’s sales of prescription medicines to surgery centers qualify as exempt sales of medicines under section 1591, paragraph (d)(2) above. Even though the surgery centers were not health facilities as defined under Health and Safety Code section 1250, and did not sell the medicines to their physicians, the physicians did furnish the medicines to their patients as part of the medical procedures the physicians performed at the surgery centers. As provided above, “furnish” means to supply by any means, by sale or otherwise. It was not necessary for the surgery centers to first sell the medicines to their physicians before the physicians were authorized to furnish them to their patients as part of the medical procedures. Thus, petitioner sold the prescription medicines at issue to the surgery centers so that their physicians could furnish the medicines to their patients for the treatment of those patients.

Grant the petition with respect to the disputed transactions.

Adopted at Sacramento, California, on December 20, 2001.

Claude Parrish_____, Chairman

John Chiang_____, Member

Dean F. Andal_____, Member

Marcy Jo Mandel_____, Member*

*For Dr. Kathleen Connell, pursuant to Government Code section 7.9.